

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1383

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ARTHUR McAVOY,

Defendant-Appellant.
-----X

Docket No. 77-1383

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BRIEF FOR APPELLANT
ARTHUR McAVOY

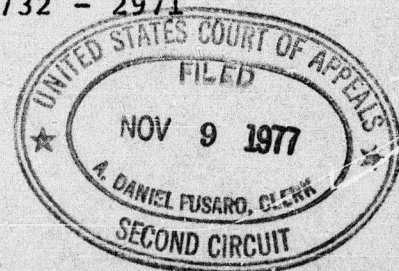
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT
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ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court erroneously instructed the jurors as to the required elements of armed bank robbery (18 U.S.C. §2113(d)).
2. Whether it was reversible error for the Court to fail to charge the jury on evaluating the voluntariness of appellant's statements.
3. Whether the District Court's failure to caution the jurors that they were not to consider the co-defendant's guilty plea as evidence of appellant's guilt requires reversal.
4. Whether the sentence imposed on Counts One and Five must be vacated.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Lasker, J.) rendered on July 1, 1977 after a jury trial, convicting appellant of two counts of bank robbery by force and intimidation (Counts I and V) (18 U.S.C. §§2113(a), 2) and two counts of bank robbery by assault and use of a dangerous weapon (Counts II and VI) (18 U.S.C. §§2113(d), 2).

Appellant was sentenced to five years' imprisonment on Counts One and Two, and five years' probation on Counts Five and Six, the probationary term to be served consecutively to the sentence imposed on the first two counts.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

Appellant and co-defendant Peter Quinn were charged with committing two armed bank robberies in the winter and spring of 1975. Counts One and Five alleged that on January 24, 1975 and

*The indictment is "B" to appellant's separate appendix.

March 14, 1975, respectively, appellant and Quinn * robbed the Larchmont branch of the People's Bank for Savings and the New Rochelle branch of the Chase Manhattan Bank. (18 U.S.C. §§2113(a), 2). Counts Five and Six** charged that during the course of those robberies, the defendants had assaulted and placed the lives of the banks' employees in jeopardy by using a dangerous weapon (18 U.S.C. §§2113(d), 2).

B. The Government's Case

Three tellers from the People's Bank for Savings testified that a robbery had occurred at the bank on January 24, 1975 (9-10, 13, 15-16, 18, 23-24).*** They indicated that one of the robbers held, what appeared to be, a "small toy pistol" (13, 9, 16, 23), and did not identify either co-defendant Quinn or appellant as participants in the crime (14, 19, 26).

Gilberto Schmidt, charged in the indictment as a co-defendant, testified**** that on January 24, 1975, appellant and Quinn asked Schmidt to drive them to Westchester. Schmidt testified that he agreed to the request and after they arrived in a parking lot

*Count One also named one Gilberto Schmidt as a co-defendant.

**Counts Three and Four, involving a February bank robbery, were not tried but were dismissed at the time of appellant's sentence.

***Numerals in parenthesis refer to pages of the trial transcript.

****Schmidt testified after invoking his Fifth Amendment right against self-incrimination and being given testimonial use immunity (33-35).

in Westchester, appellant and Quinn left the car wearing wigs, returning a short time later with a flight bag containing money (133-134).*

Three employees of the Chase Manhattan Bank testified that on March 14, 1975, a robbery occurred at that bank. During the incident, one of the robbers, identified by teller Carol Revet as co-defendant Quinn (94, 95), pointed "what looked like a gun" (60) and jumped on the top of the tellers' counter (59-60, 93-94, 102). The tellers did not identify appellant as one of the robbers** (64, 96, 104-105).

After Revet identified the co-defendant as a participant in the March 14 bank robbery, the co-defendant entered a guilty plea out of the jurors' presence (108-123). Upon the conclusion of the plea proceedings, the District Court informed the jurors that "[t]he case of Mr. Quinn has been disposed of without the necessity of the jury determining it" (123).***

*Schmidt's testimony was corroborated in part by Christine Klein, who testified that she drove to Westchester with Schmidt, appellant, and another person named "Pete" (188-190, 193-197).

**A customer at the Chase bank testified that after the robbery he saw a piece of paper on the bank counter (126). Agent George Wisnovsky stated that he found the piece of paper, which was a passport application in the name of Donald Harrison Craigie (176-177, 182-183). Police Officer William Ciccocanti testified that on February 11, 1975, appellant represented himself to be Donald H. Craigie (151).

***The district judge then instructed the jurors that appellant "is presumed innocent of the charges and that presumption remains until and unless at the end of the trial you should unanimously agree the government has proven any of the charges against him beyond a reasonable doubt" (124).

C. The Hearing Held During the Trial

As a result of defense motions (42-43, 151, 153), a hearing was held in interruption of trial to determine the voluntariness of appellant's statements about a prior bank robbery. At the hearing, FBI Agent George Wisnovsky testified that on December 20, 1974, after he advised appellant of his Miranda rights, the agent interrogated appellant (154-155). In response to questioning, appellant stated that on December 17, 1974, he participated in a robbery of the Mamaroneck branch of the Marine Midland Bank (156-157).^{*} Further, the agent indicated that when he questioned appellant, he knew that appellant was a drug addict (162).

Appellant also testified at the hearing. He admitted to a long history of mental illness, having been treated in approximately fifteen hospitals. Further, appellant stated that he had attempted suicide "many times;" that he had a feeling that people were spying on him; and that he only gave the oral statement to protect his girlfriend from prosecution on an unrelated charge (172-173, 168-169).

The District Court denied the motion to suppress, ruling "that the circumstances of the taking of this statement were not such that it could be considered involuntary or the defendant's will was overborne..." (174). At trial, Agent Wisnovsky testified to appellant's statement relating to the prior

^{*}At the hearing, Wisnovsky stated that appellant indicated he used an unloaded pistol during the December 17 robbery (157).

bank robbery (179-180).* The judge cautioned the jurors that appellant's statement could only be used "to determine when the time comes for you to determine it, whether or not Mr. McAvoy is being considered in relation to the person that committed the crimes that are charged here and whether he intended to commit the crimes charged here" (178).**

D. The Charge*** and Verdict

After reading Counts One and Two of the indictment, the judge told the jurors that although appellant was the only person whose guilt or innocence they should announce in their verdict, they "may have to determine the nature of the participation, if any, of others" (315).

As to the crime of aggravated bank robbery in violation of 18 U.S.C. §2113(d), the district judge instructed the jurors that guilt could be predicated on alternative theories (319-320). The judge stated that to convict on this charge, the jurors were required to find that in the course of committing the less serious form of bank robbery in violation of 18 U.S.C. §2113(a) (the offenses described in Counts One and Three****), appellant "either assaulted

*As a result of Wisnovsky's testimony, the defense made a motion for a mistrial (186).

**Agent David Carman also testified as part of the Government's case. He stated that as a result of a search on the date appellant was arrested, he seized two guns -- one in appellant's jacket, and one in a locker for which appellant had the key (242, 245). Carman testified that the guns were not tested to determine whether they were operable and that he did not know whether they could be fired (248).

***The charge is "C" to appellant's separate appendix.

****For purposes of clarity, Counts Five and Six in the indictment were re-numbered as Three and Four, respectively.

one or more persons or by the use of a dangerous weapon, that is a firearm, puts in jeopardy the life or lives of one or more persons" (319). The District Court defined assault in the following manner:

Now, the word "assault" is defined to include an unlawful attempt or threat to apply force or violence or to inflict bodily injury when the attempt or threat is coupled with the apparent ability to carry it out then and there; so that it arouses a fear in the intended threatened victim that he or she will be subject to immediate physical injury (319-320).

As a specific example, the judge stated that:

...the flourishing or pointing or showing of a pistol or gun at another person for the purpose of putting that other person in fear would be sufficient to constitute an assault (320).

With respect to the necessary findings on the alternative theory of guilt -- placing lives in jeopardy by use of a dangerous weapon -- the District Court instructed the jurors that they:

...must be convinced beyond a reasonable doubt that the defendant under question carried one or more firearms or that he aided and abetted a co-defendant to do so. It is not essential to such a finding that there be direct evidence that shows the firearm was loaded in fact. If a person is engaged in a robbery and does place or points a gun to insure his demand and intends to produce a fear in a person or persons, the jury is permitted to infer that from these facts the gun was loaded and capable of inflicting the deadly injury threatened by the one who employed it. (320-321)

The judge failed to instruct the jurors that they were required to find that any gun used was actually operable and capable of inflicting injury. He also gave no instruction on whether and how the jurors were to evaluate the voluntariness of appellant's post-arrest statement relating to the prior robbery.

At the conclusion of the jury instructions, defense counsel objected to the portion of the charge dealing with the use of a deadly weapon ("[t]here was something about the use of a deadly weapon during the commission of the bank robbery that just didn't sit right..." (327)), but no additional instructions were given.

After deliberations and the re-reading of testimony, appellant was found guilty as charged.

E. The Sentence

During the sentencing proceeding, the District Court expressed its concern that since appellant had been convicted of both aggravated bank robbery (Counts Two and Six), and the lesser included offense of bank robbery by intimidation (Counts One and Five), the sentence imposed not be duplicative (Transcript of July 1, 1977 at 18). Despite this, the district judge imposed a sentence of five years' imprisonment on "Counts One and Two" to be followed by five years' probation on "Counts Five and Six."

ARGUMENT

POINT I

THE DISTRICT COURT ERRONEOUSLY IN-
STRUCTED THE JURORS AS TO THE RE-
QUIRED ELEMENTS OF ARMED BANK ROBBERY
(18 U.S.C. §2113(d)).

Bank robbery in violation of 18 U.S.C. §2113(a) requires a finding that the money involved was taken by force and violence or by intimidation. In addition to these elements, in order to convict under subsection (d) of that statute, and to justify the enhanced penalty provisions, the jurors must also find either an assault or the placing of lives in jeopardy by use of a dangerous weapon. Because the District Court's instructions on both of these theories of guilt were improper, reversal of appellant's conviction under §2113(d) is required.

A. The District Court's charge that the jurors could find appellant guilty if they found he had the apparent ability to inflict injury was incorrect.

The district judge told the jurors that they could convict appellant of the enhanced crime of bank robbery by assault (§2113(d)) if they found that appellant had the "apparent ability" to inflict injury. Indeed, as a concrete example of the crime charged, the judge incorrectly stated that the mere display of a pistol was sufficient to constitute the offense (320). The judge's charge, because it is in conflict with the legislative intent of the statute, as well as the applicable cases, requires reversal.

Congress proscribed bank robbery by force, violence and intimidation (§2113(a)) and by assault (§2113(d)). The increased penalty for the latter reflects Congress' perception that the offense in §2113(d) is both different and more serious than the crime defined in §2113(a). Prince v. United States, 352 U.S. 322 (1957). While apparent ability to inflict harm and induce fear is enough to convict under subsection (a),* United States v. Alsop, 479 F.2d 65, 67 (9th Cir. 1973); United States v. Jacquillon, 469 F.2d 380, 385 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973); United States v. Brown, 412 F.2d 381, 383 (8th Cir. 1969), the statutory scheme of §2113 "manifests the Congressional intent that assault in subsection (d) was not intended to be consummated by mere proof of the actor's apparent intent and the reasonable apprehension of the victim." Bradley v. United States, 447 F.2d 264, 274 (8th Cir. 1971), vacated as moot, 404 U.S. 567 (1972); United States v. Stewart, 513 F.2d 956, 960 (2d Cir. 1975).

Thus, the relevant cases hold that in order to distinguish the crime defined in §2113(a) from that in §2113(d), the latter requires not only an apparent ability, but also "an objective capability to cause physical harm to the victim by the means threatened." Bradley v. United States, supra, 447 F.2d at 275; Cf. United States v. Thomas, 521 F.2d 76, 81 (8th Cir. 1975)

*Thus, this crime is similar to the common law crime known as "simple assault," adapted from the law of torts. Price v. United States, 156 F.2d 950 (9th Cir.); Bradley v. United States, 447 F.2d 264, 274 n.19 (8th Cir. 1971), vacated as moot, 404 U.S. 567 (1972); United States v. Beasley, 438 F.2d 1279, 1289 (6th Cir. 1971) (McCree, dissenting).

(rehearing denied); Cf. United States v. Stewart, 513 F.2d 957, 960 (2d Cir. 1975) (no instruction given that assault requires objective capability of causing harm).

While the Fifth and Sixth Circuits have adopted the contrary position that an apparent ability to inflict injury is sufficient to constitute an assault, United States v. Cooper, 462 F.2d 1343, 1344 (5th Cir. 1972); United States v. Beasley, 438 F.2d 1279, 1282 (6th Cir. 1971), (McCree, dissenting), these decisions should be rejected for two reasons. First, their holdings violate the relevant legislative intent by making the crimes set forth in section 2113(a) and (d) identical. Second, the decisions of the Fifth and Sixth Circuits are contrary to the clear implication of this Court's decision in United States v. Marshall, 427 F.2d 434 (2d Cir. 1970).

In Marshall, this Court construed the "in jeopardy" provision of §2113(d), holding that although the use of a gun during a robbery permits the inference that it was loaded, the jurors were required to make "a finding that lives were objectively in danger..." United States v. Marshall, supra, 427 F.2d at 437; accord, United States v. Stewart, supra, 513 F.2d at 960. However, the decisions of the Fifth and Sixth Circuits (Baker v. United States, 412 F.2d 1069, 1072 (5th Cir. 1969), cert. denied, 396 U.S. 1018 (1970); United States v. Beasley, supra) reject this holding, finding that the mere use of a weapon, even absent proof that it was loaded, places lives in jeopardy "as a matter of law." See, United States v. Marshall, supra, 427 F.2d at 436.

Thus, appellant's position, requiring a jury determination of

actual ability to inflict harm, is supported by analogy by this Court's holding in Marshall and has the beneficial effect of making the alternative theories of guilt set forth in §2113(d) -- assault and placing lives in jeopardy -- parallel crimes, requiring similar elements. See, United States v. Coulter, 474 F.2d 1004, 1005 (9th Cir. 1973). Absent such a finding, the crime defined in §2113(d) is indistinguishable from that set forth in §2113(a).* Cf. United States v. Thomas, supra, 521 F.2d at 81.

B. The District Court's failure to tell the jurors that they were required to find that any weapon used in the bank robbery was capable of operation requires reversal.

To constitute a violation of the crime of placing lives in jeopardy by the use of a dangerous weapon during the commission of a bank robbery (§2113(d)), the Government must prove, and the jurors find, that any weapon used is loaded and capable of firing. United States v. Marshall, supra, 427 F.2d at 437; United States v. Thomas, supra, 521 F.2d at 81. See also, United States v. Howard, 506 F.2d 1131, 1133 (2d Cir. 1974). Specifically, the jurors should be instructed that a dangerous weapon includes "anything capable of being readily operated," as well as "an operable firearm...capable of firing..." 2 Devitt and

*The rejection of appellant's position would have the anomalous effect of permitting conviction under §2113(d), even when the proof showed the use of a weapon incapable of causing harm, a result directly in conflict with the Marshall decision.

Blackmar, Federal Jury Instructions, §44.08 (3d ed. 1977). Because the District Court failed to instruct the jury on this element of the crime, appellant's conviction, predicated on 18 U.S.C. §2113(d), must be reversed. United States v. Natale, 526 F.2d 1160. (2d Cir. 1975); United States v. Howard, supra, 506 F.2d at 1133, 1167; United States v. Clark, 475 F.2d 249, 250 (2d Cir. 1973); United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972).

Not only did the District Court fail to charge that the jurors were required to find that any weapon used was objectively capable of inflicting injury, but other instructions, affirmatively indicated that such a finding was unnecessary. Thus, the district judge told the jurors that to justify the conclusion that appellant used a dangerous weapon, they "must be convinced beyond a reasonable doubt that the defendant under question carried one or more firearms or that he aided and abetted a co-defendant to do so" and that "it is not essential to such a finding that there be direct evidence that shows the firearm is loaded in fact" (320-321). While the District Court informed the jurors that, from the use of a gun in a bank robbery they could infer that the gun was loaded and capable of inflicting injury (321), See, United States v. Marshall, supra, 427 F.2d at 437, he never indicated that this finding was required to convict. Indeed, taken as a whole, the charge suggested that the use of any weapon, whether or not operable, satisfied the necessary proof of the element of the crime charged.

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The defects in the District Court's charge were not merely technical mistakes or harmless error. Compare United States v. Stewart, supra, 513 at 960; United States v. Cady, 495 F.2d 742, 747 (8th Cir. 1974). There was no proof in the case that any shots were fired. Moreover, Agent Wisnovsky testified at the hearing held during trial that appellant stated he had used an unloaded pistol (157). Ms. Revet, a teller, stated that one of the robbers had, what appeared to be, a small toy pistol, and Agent Carman indicated that he did not know whether the guns in evidence, found in appellant's jacket and in a locker, were operable. (248). Thus, there was substantial evidence tending to show that the guns were neither loaded nor operable, and the issue should have been submitted to the jurors for their determination. The District Court's failure to do so requires reversal of those counts predicated on §2113(d). United States v. Marshall, supra, 427 F.2d at 438.

POINT II

IT WAS REVERSIBLE ERROR FOR THE COURT
TO FAIL TO CHARGE THE JURY ON EVALU-
ATING THE VOLUNTARINESS OF APPELLANT'S
STATEMENTS.

At a hearing held in interruption of the trial, appellant raised the issue of the voluntariness of his post-arrest statements relating to a prior bank robbery. The judge heard testimony on the issue and found that the statements were voluntary and admissible. At trial, Agent Wisnovsky testified to the statements. However, Judge Lasker did not tell the jurors that they were to determine whether the statements were voluntary, as is required under 18 U.S.C. §3501, and gave no instruction on the issue. This failure to charge the jury is plain error. United States v. Barry, 518 F.2d 342, 347 (2d Cir. 1975), United States v. Luchetti, 533 F.2d 28, 40 (2d Cir. 1976).

The issue was raised in the District Court by appellant's testimony during the hearing that he had a long history of mental illness, had attempted suicide many times, and gave the statement only to protect his girlfriend from prosecution, and by Agent Wisnovsky's testimony at trial that after warning appellant of his constitutional rights, Wisnovsky interrogated appellant. However, the question of the voluntariness of the statements raised by the evidence, was one properly to be resolved by the jury. See, United States v. Luchetti, supra, 533 F.2d at 40.

Even though the statements in this case were only admitted

as proof of a prior similar act, a clear instruction on voluntariness was still necessary, since such instructions are required about "any confession of guilt" or "any self-incriminating statement made or given orally..." 18 U.S.C. §3501(e). Cf. United States v. Diop, 546 F.2d 485, 486 (2d Cir. 1976) (instruction required when statement offered as part of Government's rebuttal case). Indeed, the jurors should not have been allowed to utilize the statement for any purpose unless they first found those statements to be voluntary and accurate under all the circumstances. Malinski v. New York, 324 U.S. 401, 404 (1945); Payne v. Arkansas, 356 U.S. 560, 581 n.1 (1958); Haynes v. Washington, 373 U.S. 504, 513 (1963).

On the facts of this case, the error was not harmless. Both during summation and rebuttal summation, the Assistant United States Attorney reviewed Agent Wisnovsky's testimony about appellant's statement (273-274, 302). Moreover, the prosecutor argued that the jurors could consider the prior similar act as proof of appellant's guilt, since it "closely resembles the crime of which the defendant stands charged now" (273) and reflected a similar pattern of conduct (274).

On this record, where there was no identification testimony by the bank tellers who witnessed the robberies, the statements were important non-accomplice evidence favoring the Government. Accordingly, the failure to charge the jurors that they must determine whether the statements were voluntary was error, requiring reversal.

POINT III

THE DISTRICT COURT'S FAILURE TO CAUTION
THE JURORS THAT THEY WERE NOT TO CON-
SIDER THE CO-DEFENDANT'S GUILTY PLEA
AS EVIDENCE OF APPELLANT'S GUILT RE-
QUIRES REVERSAL.

The law is clear that when a co-defendant enters a guilty plea in the course of a trial, the judge must caution the jury that the plea should be disregarded completely in their determinations and is no proof whatsoever of the guilt of the remaining defendants. See, e.g., United States v. Toliver, 541 F.2d 958, 967 (2d Cir. 1976); United States v. Newman, 490 F.2d 139, 144 (3d Cir. 1974); United States v. Earley, 482 F.2d 53, 58 (10th Cir. 1973); United States v. Aronson, 319 F.2d 48, 52 (2d Cir. 1963). See also, United States v. Womack, 454 F.2d 1337, 1346 (5th Cir. 1972). Despite this long-standing principle, here, after the co-defendant Quinn entered a guilty plea, the District Court only told the jurors that the co-defendant's case "has been disposed of without the necessity of the jury determining it" (123). This instruction effectively communicated to the jurors that the co-defendant had pleaded guilty to the charges involved, without cautioning them that they were not to consider it for any purpose whatsoever.

While the judge did remind the jurors of the presumption of innocence and the Government's burden of proof, this was insufficient to cure the error, and the circumstances involved here were extremely prejudicial.*

*Because Quinn, the co-defendant who pleaded guilty, did not testify as part of the Government's case, the situation involved here is distinguishable from that in United States v. Rothman, 463 F.2d 488, 490 (2d Cir. 1972).

Indeed, the jurors were told that, in addition to deciding appellant's culpability, they would also have to determine the nature of the participation of those charged but not on trial (315). Thus, without the required limiting instruction, the jurors were impermissibly left free to consider Quinn's plea in determining whether the Government had satisfied its burden both as to appellant and, to the extent appellant's guilt was related to Quinn's, as to Quinn. Thus, the failure to give the necessary charge was extremely prejudicial, and reversal is required.

POINT IV

THE SENTENCE IMPOSED ON COUNTS ONE
AND FIVE MUST BE VACATED.

Because 18 U.S.C. §2113(a) is a lesser included offense of 18 U.S.C. §2113(d), upon conviction of both, the crimes merge, and sentence may only be imposed on the latter, Prince v. United States, supra, 352 U.S. at 329; United States v. Gaddis, 424 U.S. 544, 549 n.12 (1976); United States v. Mariani, 539 F.2d 915, 917 (2d Cir. 1976), and cases cited therein; United States v. Oliver, 523 F.2d 253, 260 (2d Cir. 1975); United States v. Stewart, 523 F.2d 1263, 1264 (2d Cir. 1975).

It is settled law in this Circuit that while simultaneous judgments of conviction under more than one subsection of the Federal Bank Robbery Act may be entered, 'simultaneous sentences, whether concurrent or consecutive, under subsections (a) and (d) [of 18 U.S.C. §2113] are improper.' United States v. Mariani,

supra, 539 F.2d at 917. (Quoting United States v. Stewart, supra, 523 F.2d at 1264).

By sentencing appellant on "Counts One and Two" and "Five and Six," the District Court here imposed such a prohibited "simultaneous" sentence on the violations of the two applicable subdivisions of 18 U.S.C. §2113. Accordingly, the sentence imposed on Counts One and Five (violations of §2113(a)), the lesser included offenses, must be vacated. United States v. Stewart, supra, 513 F.2d at 961; United States v. Gaddis, supra, 424 U.S. at 549 n.12; Prince v. United States, supra, 352 U.S. at 329.

CONCLUSION

For the foregoing reasons, reversal of the judgment of conviction and a new trial are required. In the alternative, the sentence imposed on Counts One and Five must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 8, 1977

I certify that a copy of this brief ~~and exhibits~~ has been mailed to the United States Attorney for the Southern District of New York.

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